

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO**

In re:)	PROMESA
)	Title III
THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO,)	
)	No. 17 BK 3283-LTS
as representative of)	
THE COMMONWEALTH OF PUERTO RICO,)	(Jointly Administered)
<i>et al.</i>)	
)	
Debtors.)	
)	
In re:)	
)	PROMESA
THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO,)	Title III
)	
)	No. 17 BK 4780-LTS
as representative of)	
PUERTO RICO ELECTRIC POWER)	
AUTHORITY ("PREPA"))	
)	
Debtor. ¹)	Re: 17-BK-3283-LTS, ECF Nos.
)	8789, 8838, 8850, 8886

**JOINT INFORMATIVE MOTION
PURSUANT TO ORDER OF OCTOBER 17, 2019
REGARDING COBRA ACQUISITION LLC'S MOTION FOR
ALLOWANCE AND PAYMENT OF ADMINISTRATIVE EXPENSE CLAIMS**

¹ The Debtors in these Title III Cases, along with each Debtor's respective Title III case number and the last four (4) digits of each Debtor's federal tax identification number, as applicable, are the (i) Commonwealth of Puerto Rico (Bankruptcy Case No. 17 BK 3283-LTS) (Last Four Digits of Federal Tax ID: 3481); (ii) Puerto Rico Sales Tax Financing Corporation (Bankruptcy Case No. 17 BK 3284-LTS) (Last Four Digits of Federal Tax ID: 8474); (iii) Puerto Rico Highways and Transportation Authority (Bankruptcy Case No. 17 BK 3567-LTS) (Last Four Digits of Federal Tax ID: 3808); (iv) Employees Retirement System of the Government of the Commonwealth of Puerto Rico (Bankruptcy Case No. 17 BK 3566-LTS) (Last Four Digits of Federal Tax ID: 9686); (v) Puerto Rico Electric Power Authority (Bankruptcy Case No. 17 BK 4780-LTS) (Last Four Digits of Federal Tax ID: 3747); and (vi) Puerto Rico Public Buildings Authority ("PBA") (Bankruptcy Case No. 19-BK-5233-LTS) (Last Four Digits of Federal Tax ID: 3801) (Title III case numbers are listed as Bankruptcy Case numbers due to software limitations).

To the Honorable United States District Judge Laura T. Swain:

The Puerto Rico Electric Power Authority (“PREPA”), by and through the Financial Oversight and Management Board for Puerto Rico (the “Oversight Board”), as the Debtor’s representative pursuant to section 315(b) of the *Puerto Rico Oversight, Management, and Economic Stability Act* (“PROMESA”), the Puerto Rico Fiscal Agency and Financial Advisory Authority (“AAFAF,” and together with PREPA and the Oversight Board, the “Government Parties”), and Cobra Acquisitions LLC (“Cobra”) (collectively, the “parties”), respectfully submit this joint informative motion pursuant to the Court’s *Order Granting Joint Urgent Motion of the Oversight Board, PREPA, and AAFAF to Extend All Applicable Deadlines to Cobra Acquisition LLC’s Motion for Allowance and Payment of Administrative Expense Claims*, dated October 17, 2019 (Docket Entry No. 8886) (the “Stay Order”), which ordered as follows:

The parties are directed to file, by January 22, 2020, a joint informative motion (i) addressing the status of the pending criminal matter; (ii) addressing the status of FEMA’s review of Cobra’s contracts with PREPA; (iii) providing a summary of potential factual disputes that the parties anticipate will need to be tried; (iv) proposing a consensual pretrial schedule for discovery and briefing; and (v) notifying the Court of any additional issues pertaining to the Administrative Expense Motion that have arisen.

Stay Order at 3.

The parties respectfully state as follows:

I. Status of the Pending Criminal Matter

As the Court is aware, on September 3, 2019, a federal grand jury sitting in the District of Puerto Rico returned a 15-count indictment in the matter of *U.S.A. v. Tribble*, Case No. 19-CR-541-FAB, Docket Entry No. 3 (D.P.R. Sept. 3, 2019) (the “Indictment”), alleging criminal charges against Ahsha Tribble, former Federal Emergency Management Agency (“FEMA”) FEMA Region II Deputy Regional Administrator and Sector Lead for Power and Infrastructure

in Puerto Rico, Keith Ellison, a former President of Cobra, and Jovanda Patterson, former FEMA Deputy Chief of Staff assigned to San Juan, Puerto Rico. Cobra is not a defendant in the case.²

The defendants have each been arraigned on the Indictment and bail was set. On October 18, 2019, the government and the defendants appeared before the Court for a pretrial conference, during which the government was ordered to produce discovery, which the government described as “voluminous.” Given the volume of discovery, and the defendants’ needs to review such discovery to decide whether to file pretrial motions, the Court excluded time pursuant to the Speedy Trial Act until the next pretrial conference, finding that such exclusion was in the interests of justice.

After initially issuing a scheduling order setting a trial date of December 9, 2019, the Court presiding over the pending criminal matter set aside that scheduling order. *U.S.A. v. Tribble*, Case No. 19-CR-541-FAB, Docket Entry No. 59 (D.P.R. Oct. 18, 2019).

A status conference is scheduled for February 13, 2020. No trial date or deadlines for motions have been set.

II. Status of FEMA’s Review of Cobra’s Contracts with PREPA

As the Court is aware, the Office of the Inspector General of the Department of Homeland Security issued a report entitled “FEMA’s Eligibility Determination of Puerto Rico Electric Power Authority’s Contract with Cobra Acquisitions LLC” (OIG-19-52), dated July 3, 2019 (“OIG Report”). The OIG Report addressed the process FEMA used to approve the rates PREPA agreed to pay Cobra. Pursuant to the OIG Report, FEMA and the Department of Homeland Security Operational Analysis Center agreed to “analyze the time and quantities claimed by PREPA for cost reasonableness” and disallow reimbursement to PREPA of any costs

² A copy of the Indictment is at Docket Entry No. 8838-2.

PREPA agreed to pay Cobra that were unreasonable (the “FEMA Analysis”). FEMA estimated it would complete the further analysis by May 29, 2020. See OIG Report at 5. The parties are unaware of any new developments with regard to the FEMA Analysis.

III. Summary of Potential Factual Disputes Anticipated for Trial

A. Cobra’s List

Because PREPA has not responded substantively to Cobra’s claims set forth in its *Motion for Allowance and Payment of Administrative Expense Claims*, Docket Entry No. 8789, Cobra is unable to identify what factual disputes, if any, may need to be tried. Based on extensive discussions directly with PREPA officials prior to the filing of its administrative expense claims, Cobra believes that the vast majority of the material facts are not in dispute. Among the undisputed facts are that Cobra and PREPA entered into two post-petition contracts for the restoration of Puerto Rico’s devastated power grid (one on or about October 19, 2017 and thereafter amended (the “First Contract”) and a second on May 26, 2018 (the “Second Contract”)), that Cobra performed all of the work required by those Contracts, and that PREPA has failed to pay in excess of \$200 million of the invoices Cobra submitted for its work.

Cobra believes that many, if not all, of its claims for payment can be resolved by summary judgment. For example, PREPA failed to pay Cobra \$61,668,083.34 due under the First Contract for reimbursement of Puerto Rico taxes in excess of 8.5% in 2018. *See* Docket Entry No. 8789 at 20. PREPA has not explained its failure to reimburse Cobra for these taxes as required and there do not appear to be any facts in dispute. Similarly, no known factual issues need to be resolved regarding the invoices Cobra submitted to PREPA totaling \$20,137,138.94 to which PREPA did not raise any objections, either during the period allowed by the Contracts or in the months of discussions that followed. *Id.* at 15. Indeed, PREPA acknowledged that payment

is due for these invoices and, for several months preceding Cobra's filing in this Court, represented to Cobra that payment was forthcoming, but no payment was made. *Id.* Also, there do not appear to be any factual issues regarding the \$7,551,956.01 in payments that PREPA withheld based on a claimed prompt payment discount – the issue appears to be one of contract interpretation. *Id.* at 15-16.

There also appear to be few or no factual disputes with respect to those invoices for which PREPA has offered some reason for its failure to pay. For example, PREPA has withheld payments on invoices totaling \$86,965,033.06 because PREPA demands further proof of the number of workers reflected on those invoices (the "headcount"), even though Cobra has submitted all of the documentation required by the Contracts (and more) to establish entitlement to payment. *See* Docket Entry No. 8789 at 16-17. Because the Contract terms alone establish Cobra's right to be paid on these invoices (the authenticity of which has not been questioned), no disputed issues of material fact need to be resolved in order for Cobra's claims to be allowed and payment remitted therewith. Likewise, whether PREPA was entitled to reject invoices in the amount of \$19,967,796.20 on the grounds that they relate to work Cobra performed that was beyond the scope of work under the Contracts, *id.* at 17-19, is a matter of contract interpretation because the fact that Cobra completed the work is not in dispute.

To the extent any material factual issues arise when PREPA states its position on Cobra's claims in an answering pleading or during discovery, they likely are to be relatively minor in scope. For example, two of Cobra's claims relate to work Cobra performed at PREPA's direction that PREPA now contends was unnecessary. *See* Docket Entry No. 8789 at 19 (claim for \$4,307,491.88 relating to work Cobra performed in preparation for Hurricane Beryl) and 19-20 (claim for \$3,080,426.54 for mapping work). These claims may involve factual disputes as to

whether PREPA directed Cobra to perform the work in question, while the fact that Cobra performed the invoiced work does not appear to be in dispute.

Cobra submits that the Government Parties' list of factual disputes ignores the extensive discussions between Cobra and PREPA that preceded the filing of Cobra's administrative expense claims. During those months-long discussions, the parties narrowed many of the issues on the Government Parties' list. Indeed, some issues were resolved completely, but PREPA simply failed to pay.

B. Government Parties' List

PREPA contends that there are hundreds of Cobra invoices in dispute and disputes Cobra's assertions, set forth above, that there are few, if any, material facts in dispute. The hundreds of disputed invoices have a face value of over \$200 million. The basis of these disputed invoices includes accuracy of headcounts, authorization of underlying work, verification of work performed as billed, and the merits of earned discounts for promptly paid invoices. Specifically, the preliminary categories of factual disputes are:

1. The accuracy of the headcounts as invoiced;
2. Billing of non-restoration issues;
3. Inappropriate billing of access mapping;
4. Pending inspection reports;
5. Alleged accrued interest on unauthorized or disputed work;
6. Incorrect demobilization billing;
7. Tax gross-up amount;
8. Prompt payment discount for amounts withheld from payment by PREPA;
9. Unauthorized work on Vieques and Roosevelt Road; and

10. Miscellaneous billing issues.

In addition, the disposition of the criminal matter and results set forth in the FEMA Analysis may impact the enforceability of Cobra's contracts with PREPA, or at a minimum, increase the scope of the factual disputes to include issues such as Cobra's bidding and pricing practices and the reasonableness of the costs charged by Cobra.

IV. Consensual Pretrial Schedule for Discovery and Briefing

A. Cobra's Position

Cobra contends that the stay should be lifted and its administrative expense claims should proceed forthwith. Cobra's interest in receiving payment for more than \$200 million on outstanding invoices for work it indisputably performed outweighs the Government Parties' speculation that developments in the criminal proceeding or the results of the FEMA Analysis may affect the claims. Cobra disagrees that the criminal proceedings or the FEMA Analysis will have any impact on Cobra's right to payment for work it indisputably completed at rates that PREPA agreed to pay and that FEMA contemporaneously found to be reasonable.

Even if the outcome of those other proceedings are assumed to have some bearing on Cobra's claims, much can be accomplished toward resolution of the claims in the meantime. An indefinite delay of any progress toward a decision on Cobra's claims in excess of \$200 million would be prejudicial, unfair and unjust.

Date	Event	Requirements
January 30, 2020	PREPA Answer to Claims set forth in Administrative Expense Motion	Sufficiently detailed to permit Cobra to identify any matters in genuine dispute and conduct focused discovery on those issues
February 6, 2020	Initial Disclosures	Consistent with FRCP 26(f)

February 14, 2020	Last day to issue document requests, interrogatories, requests to admit (“written discovery”)	No more than 10 interrogatories and 10 requests to admit
March 6, 2020	Last day to respond to written discovery, produce documents and provide privilege logs	
March 27, 2020	Completion of depositions and all other fact discovery	
April 3, 2020	Disclosure of any expert witnesses and their reports	
April 10, 2020	Disclosure of any rebuttal experts and their reports	
April 24, 2020	Close of expert discovery	
May 8, 2020	Exchange pretrial briefs, pretrial motions, and witness and exhibit lists	
Date set by Court	Hearing	
1 week after hearing	Post-trial briefs	No replies

Any party may move for full or partial summary judgment at any time. Responses to such motions shall be filed within seven days.

Cobra notes that the Government Parties’ proposed schedule omits any requirement that PREPA answer Cobra’s claims before fact discovery begins. Even setting aside the unfairness of requiring Cobra to conduct discovery before PREPA has disclosed its position on the relevant issues, the discovery process will be far more focused and efficient if PREPA has disclosed the factual and/or legal bases for its refusal to pay Cobra in accordance with the Contracts.

B. Government Parties' Position

The premise of Cobra's position that the stay should be lifted, to allow Cobra's claim to be resolved and paid "forthwith," is mistaken. As the Court stated in its Stay Order, "PROMESA does not require PREPA to remit any such funds prior to the effective date of a confirmed plan of adjustment" Stay Order at 2–3. Thus, Cobra has no entitlement to get paid before the effective date of the plan and it is not prejudiced by the continuation of the stay.

Because neither the criminal matter nor the FEMA Analysis has yet been concluded, the Government Parties submit that the Court should continue the stay in this matter. The grounds on which this Court granted the stay in October 2019 still apply with equal force today. Both the criminal matter and the FEMA Analysis of Cobra's contracts have the potential to significantly impact the merits and outcome of Cobra's Administrative Expense Motion and the Court should have the benefit of the results of those proceedings before moving forward with Cobra's motion. As the Court found in its Stay Order, "[s]ignificant factual and legal questions that could bear upon the Administrative Expense Motion will likely be addressed in connection with the anticipated criminal trial of Cobra's former president and two former Federal Emergency Management Agency ("FEMA") officials" and "FEMA's ongoing analysis of Cobra's contracts with PREPA similarly weighs in favor of a stay." Stay Order at 2. Both of those conclusions are as true today as they were on October 17, 2019 when the Court issued its Stay Order.

Adjudication of this contested matter, if it were to occur now, would involve extensive fact discovery, including document requests, interrogatories, requests for admission and depositions.³ Many prospective deponents from Cobra and PREPA are likely witnesses in the

³ Cobra also is mistaken that it is entitled to the equivalent of an "answer" to its Administrative Expense Motion. No such pleading is required and PREPA's identification of subjects in dispute set forth above and in PREPA's urgent motion to stay (Docket Entry No. 8838) provide Cobra with sufficient information to conduct discovery when it is appropriate to do so.

criminal trial, including Keith Ellison. The relevant documents to be collected and produced, including invoices, back-up documentation and related email correspondence, are anticipated to be voluminous. In addition, certain issues, such as the tax gross-up dispute, likely require expert discovery. The expected costs associated with engaging in those activities may never become necessary depending upon the outcome of the criminal proceedings and/or FEMA Analysis.

Even if all of that were not true, the accelerated schedule Cobra proposes below would be highly inappropriate. It ignores the important potential impact of the criminal trial and FEMA investigation and seeks to push the Court's consideration of its \$250 million claim forward before all of the relevant facts can be available. In all events, Cobra's proposed schedule is unfairly truncated. It proposes, for instance, that the Government Parties be required to respond to Cobra's claims by January 30, the day after the January 29, 2020 Omnibus Hearing; that written discovery be heavily restricted and concluded in slightly over four weeks in total; that all fact depositions be conducted in just three weeks thereafter; the entirety of the expert process be conducted in under a month; and, pretrial papers be filed three weeks later. It also proposes that full or partial motions for summary judgment can be filed at any time with responses due just seven days later. Such a rushed schedule is unfair and unwarranted, especially under the circumstances of this claim, and not calculated to lead to a just determination based on all of the relevant facts. Moreover, PREPA is focused on responding to the power emergency caused by the recent earthquakes.

The Government Parties propose a second status conference to be conducted at the June 2020 omnibus hearing, at which time the criminal trial and FEMA Analysis are likely to have been concluded and the parties will be in a better position to project a reasonable pre-hearing schedule. Alternatively, the Government Parties propose the following pre-evidentiary hearing

schedule, which is triggered by the later of a resolution of the criminal matter, or the completion of the FEMA Analysis:

1. Initial Disclosures: 30-days from later of a disposition of the criminal charges (through guilty plea, trial verdict or dismissal of the Indictment) or FEMA Analysis release
2. Written Discovery: 14-days from Initial Disclosure
3. Responses to Written Discovery: 30-days from issuance
4. Fact Depositions: 90-days from Written Discovery deadline
5. Experts and Expert Reports: 30 days from close of fact discovery
6. Rebuttal Experts and Expert Reports: 30-days from Expert Reports deadline
7. Close of Expert Discovery: 30-days from Rebuttal Expert Reports deadline
8. Summary or Partial Summary Judgment: 30-days from close of Expert Discovery
9. Responses to SJ Motions: 21-days from filing of motions
10. Reply Briefs: 7-days from filing of responses
11. Dispositive Motions Hearing: 14-days from close of briefing
12. Pretrial Briefs, Pretrial Motions, Witness Lists and Exhibit Lists: 30-days from later of Summary Judgment Motions ruling or close of Expert Discovery
13. Hearing Commencement Date: No less than 14-days from Pretrial Briefing/ Disclosures
14. Post-Trial Briefs: 30-days from close of evidentiary hearing
15. Post-Trial Reply Briefs: 14-days from Post-Trial Briefing

V. Additional Issues Pertaining to the Administrative Expense Motion that have Arisen

A. Cobra's Position

Neither the criminal proceeding nor the FEMA Analysis are going to resolve how much PREPA owes Cobra for its work in restoring Puerto Rico's electrical grid. Indefinitely postponing Cobra's administrative expense claims because of the *potential* that the outcome of those proceedings could affect Cobra's claims does not promote the interests of justice, especially because neither Cobra nor PREPA are parties to or have any right to participate in those proceedings.

Cobra and its parent company, Mammoth Energy Services, Inc., continue to suffer greatly due to PREPA's failure to pay Cobra the more than \$250 million it is owed and on which interest is accruing at approximately \$2.5 million per month. Since the Court's October 17, 2019 Order staying Cobra's administrative claims, Mammoth's market capitalization has fallen by another 20% to less than \$80 million, based on the closing price of its common stock on Nasdaq on January 20, 2020. For a company of this size, further uncertainty over when it will receive payment of a receivable that is triple its market capitalization is harmful to its ability to attract capital and acquire additional revenue-generating business. It is imperative to Cobra's financial health that it receive the amounts it is due (and it is undisputed that it is owed at least tens of millions of dollars) as early as possible. As the Court indicated in its October 17, 2019 Order, PREPA can be required to remit any funds due once a confirmed plan of adjustment becomes effective. Docket Entry No. 8886 at 2-3. Cobra will be prejudiced to the extent that the amounts it is owed have not been established before the effective date of a confirmed plan of adjustment.

As the Court has set a hearing for the 9019 Motion⁴ for March 31 and April 1, 2020, Cobra submits that its motion for allowance and payment of administrative claims should proceed immediately so that it may be resolved by the time the Court approves a plan of adjustment.

A. Government Parties' Position

PREPA entered into its contracts with Cobra with the reasonable expectation that costs it incurred for power restoration services would be subject to FEMA reimbursement. The contracts with Cobra provide that PREPA has no obligation to pay Cobra on account of invoices for which FEMA rejects reimbursement if such rejection is due to the sole fault of Cobra. With hundreds of millions of dollars in asserted administrative liability at stake, PREPA is entitled to determine whether and to what extent the actions of Cobra and its indicted CEO have been improper or criminal, or led or might lead to FEMA denying payment of any or all of the remaining invoices. This process cannot be completed without the conclusion of the criminal trial, and a reasonable opportunity for discovery and to review the results of FEMA's reasonable cost analysis of the First Contract, which is expected in May 2020. PREPA believes there will be ample time between now and the commencement of a confirmation hearing on any plan of adjustment to determine its liability on the remaining Cobra invoices without resorting to Cobra's proposed pretrial schedule, as it does not expect to file a proposed plan or disclosure statement until after the conclusion of the hearing on the pending 9019 Motion.

⁴ See *Joint Motion of Puerto Rico Electric Power Authority and AAFAF Pursuant to Bankruptcy Code Sections 362, 502, 922, and 928, and Bankruptcy Rules 3012(a)(1) and 9019 for Order Approving Settlements Embodied in the Restructuring Support Agreement and Tolling Certain Limitations Periods* [Case No. 17-BK-4780-LTS, ECF No. 1235], filed May 10, 2019 (the "9019 Motion"). The 9019 Motion seeks Court approval of settlements embodied in a definitive Restructuring Support Agreement between the Government Parties, certain holders of PREPA's bonds and Assured Guaranty Municipal Corp. Cobra objected to certain provisions in the 9019 Motion and the RSA that it believed prejudiced other administrative creditors. See *Cobra Acquisitions LLC's Objection to Amended Joint Motion of Puerto Rico Electric Power Authority and AAFAF Pursuant to Bankruptcy Code Sections 362, 502, 922, and 928 and Bankruptcy Rules 3012(a)(1) and 9019 for Order Approving Settlements Embodied in Restructuring Support Agreement* [Case No. 17-BK-4780-LTS, ECF No. 1682].

Moreover, it is unnecessary to resort to Cobra's proposed pretrial schedule as the Court has already determined it lacks the power to require PREPA pay any funds to Cobra prior to the effective date of a confirmed plan of adjustment. Docket Entry No. 8886. Cobra is therefore not prejudiced by any delay.

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New York, New York
January 22, 2020

Respectfully submitted,

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